Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

ELIZABETH ANN DALEY, in her own right and in her capacity as mother of Evan Daley Hippeard (Deceased), and as Personal Representative of the Estate of Evan Daley Hippeard,

Petitioner,

v.

GINNY FERGUSON, et al.,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE DUE PROCESS CLAUSE REQUIRES THE COMMONWEALTH OF VIRGINIA TO PROTECT A TWO YEAR OLD CHILD WHEN THE COMMONWEALTH, BY ITS ACTIONS, HAS PLACED THAT CHILD AT A HIGHER DEGREE OF RISK EVEN THOUGH THE COMMONWEALTH HAS NOT ASSUMED ACTUAL PHYSICAL CUSTODY OF THAT CHILD?

PARTIES TO THE PROCEEDING

Parties to the Proceeding include:

Elizabeth Ann Daley, in her own right and in her capacity as mother of Evan Daley Hippeard (Deceased), and as personal Representative of the Estate of Evan Daley Hippeard, Petitioner;

Ginny Ferguson, Respondent;

John Twisdale, Respondent;

Hanover County ex rel Hanover County Department of Social Services, Respondent;

Hanover County Department of Social Services, Respondent;

The Board of Social Services of Hanover County, Respondent.

No parent companies or wholly owned subsidiaries are applicable to these parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, but set out in the Appendix at pages 8 through 14.

The opinion of the United States District Court for the Eastern District of Virginia on the defendants' motion for summary judgments also unreported, but set out in the Appendix at pages 15 through 25.

STATEMENT OF JURISDICTION

(I)Pursuant to and in compliance with Rule 11 of the Rules of the Supreme Court, this petition is filed for review of the decision of the Fourth Circuit Court of Appeals decided May 24, 1996 in the case styled Elizabeth Ann Daley, in her own right and in her capacity as mother of Evan Daley Hippeard (Deceased), and as Personal Representative of the Estate of Evan Daley Hippeard v. Hanover County, ex rel Hanover County Department of Social Services, Department of Social Services, The Board of Social Services of Hanover County, Ginny Ferguson, and John Twisdale; Case No. 95-2360.

(ii) Neither rehearings nor extensions of time were requested.

(iii) This is not a cross petition.

(iv) This action arises under 42 U.S.C. § 1983

and subject matter jurisdiction was conferred upon the district court pursuant to 28 U.S.C. § 1331. Appellate jurisdiction arises under 28 U.S.C. § 1291. Jurisdiction in this Court arises under 28 U.S.C. § 1254.

(v) Notice pursuant to Rule 29.4 is not applicable to this case.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or inditement of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ....

STATEMENT OF THE CASE

This is a case about a grossly negligent child protective service investigation conducted by the Hanover County Department of Social Services through Ginny Ferguson and John Twisdale. The Defendants' promise to conduct a full child abuse investigation and their failure to do so enhanced the danger presented to two year old Evan Hippeard and ultimately led to his death.

On the night of April 1, 1994, Evan Hippeard was spending the night at his father's home. At the time, Mr. Hippeard was divorced from Evan's mother and was living with his paramour, Lauren O'Dell. On the morning of April 2, Mr. Hippeard noticed that Evan's arm was injured. He brought Evan home so that his mother could take him to the doctor. Dr. Petrizzi diagnosed a severe break and made arrangements to treat Evan. Because of the severity of the break and the inability to explain the cause of it, Dr. Petrizzi filed a child abuse complaint with the Hanover County Department of Social Services.

Defendant Ginny Ferguson, than a social worker with the Hanover County Department of Social Services, represented to Evan's concerned mother that she would

complete a full investigation into the suspected abuse. Because of this representation, Elizabeth Daley believed it was safe to allow her son Evan to continue court ordered visits to the home of her former husband.

However, Ms. Ferguson did not undertake any investigation even marginally approaching a proper investigation. State policy then required that Ms. Ferguson interview the parents of Evan, face to face. She never did. State policies further required that she interview and observe the abused child. She never did. State policies required that she view the location of the alleged abuse. She never did. State policies required that she interview the complaining witness, in this case Evan's doctor, Dr. Petrizzi. She newer did. State policies required that she interview "collaterals." She never did. During a court ordered visit to his father's house, Evan was savagely beaten to death by Lauren O'Dell. He was murdered while the "investigation" was on going by Ms. Ferguson but days after State law required the investigation to have been completed. Despite her utter failure to follow almost every state guideline, Ms. Ferguson concluded that Evan was not at risk. Her acting supervisor, John Twisdale, after consultation with Ms. Ferguson and a review of her investigation, concurred. The file was closed the first work day following Evan's death.

At the time this action was brought in the United States District Court for the Eastern District of Virginia, the Fourth Circuit recognized that if a public official advised an individual of an intended course of conduct, failed to follow through, and thereby created or enhanced the danger to an ultimate victim, the due

process clause imposed an obligation on the government to protect the victim; failure to do so was recognized as actionable under 42 U.S.C. § 1983. Pinder v. Johnson, 33 F.3d 368 (4th Cir. Aug. 29, 1994) *vacated*, Oct. 14, 1994. Subsequently, the Fourth Circuit reversed its position, and ruled: "[N]one of these cases found a particularized due process right to affirmative protection based solely on an official's assurances that the danger posed by a third person will be eliminated." Pinder v. Johnson, 54 F.3d 1169, 1176 (4th Cir. 1995).

In light of this reversal of Pinder, the trial court granted a 12(b) Motion to Dismiss this action. The Fourth Circuit affirmed.

REASONS FOR WRIT

A two year old child was brutally murdered when he went for an overnight visit to his father's house pursuant to court ordered visitation. He was allowed to go by his mother, not only because of the authority of and necessary compliance with the order, but because Defendants promised to check into a recent report of suspected child abuse by the father's live in lover. Had Defendants not promised this, the mother would have withheld visitation and sought court ordered protection. The false promise was an affirmative act by the state which made Evan more susceptible to injury by dissuading his mother from seeking alternative means of protection. The promised investigation was never done. Evan was murdered during a subsequent visit.

The trial court held that Evan had no constitutional right to governmental protection since he was not in the custody of the government. The Fourth Circuit affirmed. This decision, as well as the final Pinder case, mark a retreat by the Fourth Circuit from earlier decisions. *See,* Jensen v. Conrad, 747 F.2d 185, 194 (4th Cir. 1984)("[W]here the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an 'active tortfeasor' to make it only 'just' that the state be charged with an affirmative duty of protection.") Other Circuits are at odds with the new position by the Fourth Circuit, articulated in Daley, which requires actual custody before a duty to protect arises. *See, e.g.*, Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982):

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Other Circuits have expressed similar grounds giving rise to a duty to protect. Archie v. Racine, 847 F.2d 1211, 1223 (7th Cir. 1988)(When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk."); Wells v. Walker, 852 F. 2d 368, 370-71 (8th Cir. 1988)(the state has a duty to protect where the "state affirmatively places a particular individual in a position of danger the individual would not otherwise would have been in."); Escamilla v. City of Santa Ana, 796 F.2d 266, 268 (9th Cir. 1986)("An obligation to protect may arise when the state itself has put a person

in a position of danger."). Although it asserted a similar rule of law in the past (*see, e.g.* Jensen v. Conrad, 747 F.2d 185, 194 (4th Cir.1984)), the Fourth Circuit has retreated to a "custody" test: "'Promises do not create a special relationship - custody does.'" Daley v. Hanover County, Slip op. at 4(*quoting* Pinder v. Johnson, 54 F.3d at 1175.)

The Daley decision is a misapplication of this Court's decision in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L.Ed. 249, 109 S. Ct. 998 (1989) and is at odds with the legal standards enunciated by a number of the other circuits.

Accordingly, Appellant respectfully prays that this Court grant a writ, take jurisdiction, and reverse the courts below, remand this case for a trial on the merits, and, in addition, make it clear that the State has a duty to protect an individual where the State, by its affirmative action, creates a dangerous situation or renders an individual more vulnerable to danger, even in the absence of actual custody.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DALEY V. HANOVER COUNTY EX REL. HANOVER COUNTY DEP (4th Cir. 1996)
ELIZABETH ANN DALEY, in her own right and in her capacity as mother of Evan Daley Hippeard (Deceased), and as Personal Representative of the Estate of Evan Daley Hippeard,

Plaintiff-Appellant,

vs.

No. 95-2360

HANOVER COUNTY, Ex Rel Hanover County Department of Social Services; DEPARTMENT OF SOCIAL SERVICES, Hanover County; THE BOARD OF SOCIAL SERVICES OF HANOVER COUNTY; GINNY FERGUSON; JOHN TWISDALE,

Defendants-Appellees.

1996 U.S. App. LEXIS 11872
May 24, 1996, Decided

CASE STATUS: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED

STATES COURT OF APPEALS FOR THIS CIRCUIT.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-95-304-R).

COUNSEL
ARGUED: Thomas Ogburn Bondurant, Jr., BONDURANT & BENSON, P.C., Richmond, Virginia, for Appellant.
Archibald Wallace, III, SANDS, ANDERSON, MARKS & MILLER, P.C., Richmond, Virginia, for Appellees.
ON BRIEF: W. Todd Benson,BONDURANT & BENSON, P.C., Richmond, Virginia, for Appellant.
L. Lee Byrd, SANDS, ANDERSON, MARKS & MILLER, P.C., Richmond, Virginia, for Appellees.

JUDGES
Before NIEMEYER and MOTZ, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION
PER CURIAM:

In this case, two-year-old Evan Hippeard was beaten to death by his father's girlfriend. Plaintiff, Evan's mother, brought suit, alleging that the county social service agency and its employees violated the Due Process Clause and 42 U.S.C. § 1983 by failing to protect Evan. The district court granted Defendants' motion to dismiss for failure to state a claim upon which relief can be granted, and Plaintiff appealed. We now

affirm.

I

Plaintiff Elizabeth Ann Daley alleges that she was divorced from Steve Hippeard in July, 1993, and was awarded custody of their son Evan, and that Hippeard was awarded visitation rights. On March 31, 1994, while Evan was visiting Hippeard and Hippeard's live-in girlfriend, Lauren O'Dell, Plaintiff was informed that Evan's arm looked strange. The next day, Plaintiff took Evan to Dr. Mark Patrizzi, who found a fracture in Evan's upper right arm. Dr. Patrizzi filed a complaint of suspected child abuse with the Hanover County Department of Social Services, and the complaint was assigned to social worker Ginny Ferguson, who was told by Plaintiff that her children had complained of violent behavior by O'Dell. Ferguson was also aware that another child had suffered a broken collarbone during a visit to Hippeard's home. Although Ferguson told Plaintiff that she would speak with Hippeard and O'Dell, Plaintiff alleges that Ferguson did not. On May 21, 1994, O'Dell beat Evan to death. Two days later, Ferguson and her supervisor John Twisdale sent Plaintiff a letter stating that the investigation had been "thorough" and that the"complaint against Ms. Daley" was unfounded. O'Dell was later convicted of first-degree murder.

Plaintiff brought this action under 42 U.S.C. § 1983 against defendants Hanover County, the Hanover County Department of Social Services, the Hanover County Board of Social Services, Ferguson and Twisdale. Defendants filed a Rule 12(b)(6) motion to dismiss. The district court granted that motion,

concluding that sovereign immunity barred Plaintiff's claims against the governmental defendants and against Ferguson and Twisdale to the extent they acted in their official capacities. To the extent Ferguson and Twisdale acted in their individual capacities, the district court held, Plaintiff had failed to allege the type of state action required to maintain a suit under § 1983. We affirm the judgment of the district court.

II

An order granting a motion to dismiss is subject to de novo review. Medical Waste Associates v. Mayor and City Council of Baltimore, 966 F.2d 148, 150 (4th Cir. 1992). Two cases, directly on point, are dispositive of Plaintiff's claims. In DeShaney v. Winnebago County Dep't of Social Services , 489 U.S. 189 (1989), the county department of social services received complaints that the plaintiff was being abused by his father, but the department did not remove the child from the father's home. The boy's father eventually beat him so severely that he suffered permanent brain damage and was rendered profoundly retarded. The boy and his mother alleged violation of the Due Process Clause and sued under § 1983. The district court granted summary judgment, and the court of appeals affirmed. The Supreme Court also affirmed, concluding that the Due Process Clause was only a negative prohibition on state action -- not a requirement of affirmative government protection against intrusions by private third parties."Because . . . the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so -- though calamitous in hindsight -- simply does not constitute a violation of the Due Process Clause." Id. at 202. The Court rejected the argument that the

state had created a "special relationship" requiring intervention, by distinguishing situations in which the state holds a person in custody and in which "the Constitution imposes upon it the corresponding duty to assume some responsibility for his safety and general well-being." Id. at 200.

In Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995), a police officer assured the plaintiff that her abusive ex-boyfriend would be incarcerated overnight. However, the ex-boyfriend was released and set fire to the plaintiff's home, killing her three children. This Court, sitting en banc, held that the defendant police officer was entitled to qualified immunity, holding that "qualified immunity under § 1983 shields officials from civil liability unless their actions violated clearly established statutory or constitutional rights of which a reasonable person would have known," id. at 1173 (citations omitted), and concluded that no due process right was clearly established. We held that DeShaney rejected the type of affirmative duty of protection that the plaintiff claimed in Pinder, id. at 1174-75, and rejected the plaintiff's claim that, by promising that the ex-boyfriend would be incarcerated overnight, the police officer created a"special relationship" requiring intervention. Id. at 1175. Because no due process right to protection was clearly established, the police officer was entitled to qualified immunity.

The facts in this case are, in all material respects, identical to those in DeShaney. In both cases, the government agency received a report of abuse and allegedly failed to conduct a prompt, adequate investigation. Those facts are insufficient to state a claim for violation of the Due Process Clause. Defendant

Ferguson's alleged promise that she would interview Hippeard and O'Dell does not alter the analysis. "Promises do not create a special relationship-- custody does." Pinder, 54 F.3d at 1175. Plaintiff has not alleged that she or her son were ever restrained by, or in the custody, of the defendants. The Constitution does not require affirmative government protection under these circumstances. Plaintiff relies on Swader v. Commonwealth of Virginia, 743 F. Supp. 434 (E.D. Va. 1990), but that case is readily distinguishable. In Swader, an inmate raped and killed the daughter of a prison employee who was required to live on prison grounds. The trial court concluded that the facts alleged in the complaint, if proved, were sufficient to show a "special relationship" and to constitute a cognizable claim under § 1983. In Swader, the government allegedly took the affirmative step of requiring the employee to live on the grounds and granted an inmate access to the area. There are no similar allegations of affirmative government action in the present case. Thus, Ferguson and Twisdale were entitled to qualified immunity to the extent they were acting in their individual capacities.

The district court concluded that the Eleventh Amendment barred Plaintiff's claims against the governmental defendants and against Ferguson and Twisdale to the extent they acted in their official capacities. For the most part, we agree. The Eleventh Amendment bars claims for monetary relief against state agencies and state employees acting in their official capacities. Edelman v. Jordan, 415 U.S. 651, 668 (1974).* It does not bar claims against a county itself. Mt. Healthy City School District Board of Education v. Doyle... , 429 U.S. 274, 280 (1977). Therefore, Hanover County is entitled to no immunity. However, Hanover

County is not a proper party in this case. Ferguson and Twisdale were employees.

The judgment of district court is

AFFIRMED.

DISPOSITION

AFFIRMED.

OPINION FOOTNOTES

* In view of our holdings here, we need not reach the question of whether the complaint stated a cause of action under the Due Process Clause.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

ELIZABETH ANN DALEY, in her own right and in her capacity as mother of EVAN DALEY HIPPEARD (Deceased), and as Personal Representative of the Estate of EVAN DALEY HIPPEARD,

Plaintiff,

vs.

File No. 3:95CV304

GINNY FERGUSON, et al.,

Defendants.

1995 U.S. Dist. LEXIS 14507

June 26, 1995, Decided

JUDGES
Richard L. Williams, SENIOR UNITED STATES DISTRICT JUDGE
AUTHOR: WILLIAMS
OPINION

MEMORANDUM OPINION

This matter is before the Court on the defendants' Motion to Dismiss. For the reasons set forth below, the motion is granted.

I. Background

Plaintiff Elizabeth Daley was divorced from Steve Hippeard in July 1993. Primary custody of Evan Hippeard, their one year-old son, was awarded to the plaintiff. In 1994, the plaintiff began noticing injuries to her children when they returned from court ordered visits with Hippeard and Lauren O'Dell, Hippeard's live-in girlfriend. When the plaintiff consulted with her ex-husband, Hippeard assured her that he was taking care of the children.

On April 1, 1994, Hippeard called the plaintiff and informed her that Evan's arm looked strange. Accordingly, the plaintiff took Evan to Dr. Mark Patrizzi, their family doctor, who x-rayed Evan's arm and discovered a long bone fracture. Four weeks earlier, Dr. Patrizzi had examined another Hippeard child who had suffered a broken collar bone during a visit to his father's home. After treating Evan, Dr. Patrizzi filed a complaint of suspected child abuse with the Hanover County Department of Social Services.

Defendant Ginny Ferguson, a social worker, was assigned to the Hippeard case. When Ferguson called the plaintiff to investigate Dr. Patrizzi's complaint, plaintiff informed her that Evan had fallen off a chair at her house on March 30, 1994, but that this accident did not appear to have injured him. Plaintiff further stated that her children had complained of violent behavior by O'Dell. Ferguson assured the plaintiff that, in continuing to investigate Evan's injury, she would speak to Hippeard and O'Dell.

On May 21, 1994, O'Dell apparently beat Evan

severely and left him in a bed at Hippeard's house.1 Hippeard discovered Evan's dead body when he returned home later that evening. Two days later, Ferguson and defendant John Twisdale, her supervisor, sent the plaintiff a letter stating that the investigation into Evan's broken arm was "thorough" and that the "complaint against Ms. Daley" was unfounded. Maintaining that Hanover County had permitted and condoned lax child abuse investigative services, plaintiff commenced this action under 42 U.S.C. § 1983 against the County, its Department of Social Services and Board of Social Services, Ferguson, and Twisdale. Plaintiff seeks a $ 10 million judgment against the County and punitive damages against the individual defendants in a like amount.

II. Analysis

In moving to dismiss, defendants raise the following arguments: (1) that the defendants are entitled to sovereign immunity; (2) that there was no state action in this case; (3) that the individual defendants are entitled to absolute or qualified immunity; (4) that Hanover County is not a proper party to this case; and (5) that plaintiff failed to comply with Virginia Code section 15.1-550 et seq., which requires a party seeking to sue a county for money damages to file a claim with the county's board of supervisors. The Court dismisses plaintiff's claims against the institutional defendants and the individual defendants in their official capacities on the grounds that these defendants are entitled to sovereign immunity. Further, because no state action was involved in this case, plaintiff's claims against Ferguson and Twisdale in their individual capacities are dismissed for failure to state a claim upon which relief

may be granted.2

A. Sovereign Immunity

Defendants first argue that they are entitled to sovereign immunity under the Eleventh Amendment, which provides: "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Although the Eleventh Amendment does not specifically apply to suits brought against a state by its own citizens, it has "long been held" to govern such actions. Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, 73 L. Ed. 2d 1057, 102 S. Ct. 3304 (1982). Thus, under the Eleventh Amendment, a suit cannot be maintained directly against a state, or against a state agency or department, unless the state has waived its sovereign immunity. Id. at 684.

1. Hanover County

The Supreme Court has ruled that municipal corporations and other political subdivisions of the state cannot enjoy sovereign immunity unless they function as "arms of the state" under state law. Mt. Healthy City Sch. Dist. Bd. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); see also Kahn v. Virginia Retirement Sys., 783 F. Supp. 266, 271 (E.D. Va. 1992) (citations omitted). Defendants argue that under Virginia law, counties are territorial and political subdivisions of the state. Thus, defendants contend that Hanover County is an "arm of the state" protected by sovereign immunity.

In the Commonwealth of Virginia, counties clearly are regarded as "arms of the state." Both state and federal courts in Virginia have treated counties as instrumentalities of the state. See,e.g., Mann v. County Bd., 199 Va. 169, 98 S.E.2d 515, 518 (Va. 1957) ("In Virginia, territorially and politically, counties are integral parts of the State."); Allen v. County Sch. Bd., 207 F. Supp. 349, 354 (E.D. Va. 1962) ("Count [sic] has been defined 'as a body politic, or political subdivision of the state, created by the legislature for administrative and other public purposes.'"). Indeed, the very language of the Virginia Constitution illustrates that counties are deemed units of state government. See Va. Const. art. VII, § 3 (authorizing the General Assembly to enact laws governing "any county, city, town, or other unit of government"). Since Hanover County functions as an "arm of the state" under Virginia law, it is entitled to seek shelter under Virginia's Eleventh Amendment immunity. Accordingly, the Court dismisses plaintiff's claims against the County.

2. Hanover County Board of Social Services and Hanover County Department of Social Services

With respect to Hanover County Board of Social Services and Hanover County Department of Social Services, defendants argue that these entities are governmental units of the Commonwealth that were created in the executive department responsible to the Governor. See Va. Code § 63.1-1.1 et seq. Thus, defendants maintain that these institutions, like Hanover County, are "arms of the state" protected by sovereign immunity. In response, the plaintiff claims that the Board of Social Services and the Department of Social Services are agencies within Hanover County that do

not enjoy sovereign immunity. For the purposes of this Motion to Dismiss, it is immaterial whether the Board of Social Services and the Department of Social Services are considered agencies within the Commonwealth's executive department or within Hanover County. In either circumstance, these institutions are "arms of the state" that are shielded by sovereign immunity under the Eleventh Amendment. See Board of Supervisors v. Virginia Dep't of Soc. Servs., 731 F. Supp. 735, 738-40 (W.D. Va. 1990) (Michael, J.). Thus, the Court dismisses plaintiff's claims against these defendants.

3. Individual Defendants

The defendants further' assert that, to the extent that Ferguson and Twisdale are sued in their official capacities, they are entitled to sovereign immunity. The Supreme Court has expressly stated that the Eleventh Amendment bars claims for monetary relief against state employees acting in their official capacities. Edelman v. Jordan, 415 U.S. 651, 668, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); see also Jacobs v. College of William & Mary, 495 F. Supp. 183, 191 (E.D. Va. 1980) (state college president and department head sued in their official capacities were entitled to sovereign immunity). Ferguson and Twisdale are therefore protected by sovereign immunity for their actions as employees of Hanover County Department of Social Services. Accordingly, plaintiff's claims against these defendants in their official capacities are dismissed.

B. State Action

With respect to plaintiff's remaining claims

against Ferguson and Twisdale as individuals, defendants contend that the conduct giving rise to this lawsuit -- namely, the fatal beating Evan Hippeard suffered at the hands of his father's girlfriend -- does not constitute state action. Thus, defendants submit that the plaintiff has failed to state a claim upon which relief may be granted under § 1983. This Court agrees.

The defendants correctly point out that the Supreme Court's ruling in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) is dispositive of this issue. In DeShaney, the Winnebago County Department of Social Services received reports that 2-year-old Joshua DeShaney was being abused by his father. Although the Department observed and documented Joshua's injuries over the next two years, it did not remove Joshua from his father's custody or otherwise protect him from abuse. Ultimately, Joshua's father beat him so severely that he suffered permanent brain damage. Joshua and his mother sued Winnebago County certain state employees under § 1983, arguing that defendants' failure to protect Joshua from his father's violence had deprived him of liberty without due process of law.

The district court granted defendants' Motion for Summary Judgment, and the United States Court of Appeals for the Seventh Circuit affirmed. In upholding the Seventh Circuit's ruling, the Supreme Court stated that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative obligation on a State to protect the life, liberty, and property of its citizens against invasion by private actors. Thus, respondents' failure to protect Joshua from the violence

he suffered at his father's hands did not constitute a violation of the Due Process Cause:

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

Id. at 196-197.

The DeShaney Court recognized that a State has an affirmative obligation to protect an individual where it "so restrains [the] individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs." Id. at 200. The Court ruled, however, that DeShaney did not involve such a "special relationship." The Court emphasized that Joshua's injuries were sustained while he was in the custody of his natural father, "who was in no sense a state actor." Id. at 201; see also Milburn v. Anne Arundel Cty. Dep't of Soc. Servs., 871 F.2d 474, 476 (4th Cir. 1989); Weller v. Dep't of Soc. Servs., 901 F.2d 387, 392 (4th Cir. 1990). The Court therefore concluded that, absent such a "special relationship," a State does not have an affirmative constitutional duty to protect an individual from the actions of third parties. See also Pinder v. Johnson, 54 F.3d 1169, No. 93-2125 (4th Cir. 1995) (state employee's express promises did not create "special relationship" giving rise to "clearly established" duty to protect plaintiff).

Applying DeShaney to the present case, the Court finds that the plaintiff has failed to state a claim upon which relief may be granted under § 1983. Evan Hippeard was killed by his father's girlfriend, who, like the father in Deshaney, cannot be considered a state actor. Moreover, defendants Ferguson and Twisdale never assumed custody of Evan or otherwise entered into a "special relationship" that created an affirmative obligation to protect Evan. Because Ferguson and Twisdale never had an affirmative constitutional duty to protect Evan from the actions of third parties, they never engaged in conduct that would constitute state action under § 1983. Accordingly, this Court must dismiss plaintiff's remaining claims against these defendants.

III. Conclusion

For the foregoing reasons, the Court grants defendants' Motion to Dismiss and dismisses this action with prejudice.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

JUN 26, 1995
DATE
Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

FINAL ORDER

This matter is before the Court on the defendants' Motion to Dismiss. For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS defendants' motion and DISMISSES this case with prejudice. It is SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE
JUNE 26, 1995

OPINION FOOTNOTES

1 In her Complaint, plaintiff claims that O'Dell is the "now convicted murderer of Evan" but does not provide information substantiating this claim.

2 The United States Court of Appeals for the Fourth Circuit has ruled that a motion to dismiss a § 1983 action for lack of state action should be treated as a motion under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Carter v. Norfolk Community Hosp. Ass'n, Inc., 761 F.2d 970, 974 (4th Cir. 1985) (citations omitted). Thus, although defendants styled their state action argument as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the motion must be treated as a Rule 12(b)(6) motion.